IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-610

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
Petitioners,

vs.

RUSSELL E. TRAIN, ETC., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. As to Respondent Train, the questions presented are whether Petitioners may evade the procedural notice requirement of Section 304 of the Clean Air Act, 42 U. S. C. § 1857h-2, by asserting District Court jurisdiction under 28 U. S. C. §§ 1331, 1361 and 5 U. S. C. §§ 701 *et seq.*, even though the special Clean Air Act provision was an adequate remedy in the circumstances of this case for the administrative inaction alleged by Petitioners, and whether a petition for review was properly dismissed.

2. No basis for reviewing the dismissal of the Complaint against these Respondents is shown by the Petition.

STATEMENT OF THE CASE.

This Brief in Opposition is filed in behalf of Respondents Sears, Roebuck and Co. and its subsidiary Homart Development Co., the developers of the shopping center referred to in the Petition.[1] The Seventh Circuit affirmed the District Court's judgment dismissing in its entirety a four count Complaint against 17 defendants, and dismissed a petition for review of an administrative regulation which had been consolidated with the appeal at Petitioners' instance. These Respondents, the Developers, were not parties to the petition for review, and no relief was sought against them in Counts II, III or IV of the Complaint. Accordingly, this Brief in Opposition is devoted to the reasons why this Court should not review the Seventh Circuit's disposition of Count I of the Complaint.

The Complaint did not and could not allege that the Respondent Developers were violating or threatening to violate any regulation issued under the Clean Air Act. It demanded an injunction against Developers, not on the theory that they had committed or threatened to commit a wrong, but on the theory that certain allegedly overdue regulations, when promulgated, might retroactively require Developers to obtain an EPA air quality license for their construction which had already started.

According to Count I of the Complaint, the Administrator of the Environmental Protection Agency ("the Administrator" hereinafter) had failed to perform a non-discretionary duty under the Clean Air Act—a duty to promulgate regulations by July 31, 1972, which would prevent air pollution by so-called "indirect sources" and which would prevent so-called "significant deterioration" of air quality. By the time the Complaint was filed, November 30, 1973, the Administrator had already been

1. Originally, the developers were Sears and Northbrook Court Associates, a partnership between Homart and another company. Homart has recently succeeded to the interest of the partnership.

ordered by the District of Columbia Circuit to promulgate any "indirect source" regulation which he considered necessary[2] and had already been ordered by another District Court to "exercise his expertise" on the subject of "significant deterioration" and take whatever final action he considered necessary.[3]

While the case was pending before the District Court, the Administrator promulgated an "indirect source" regulation,[4] and while it was pending before the Seventh Circuit on appeal, he promulgated a "significant deterioration" regulation.[5] Neither regulation affects Developers' center. The "indirect source" regulation applied only to projects on which construction was commenced after January 1, 1975;[6] and the "significant deterioration" regulation does not apply to pollutants emitted by automobiles.[7]

In affirming the dismissal of Count I of the Complaint, the Seventh Circuit first considered Petitioners' claim that the Dis-

2. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 968 (D. C. Cir. 1973).

3. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C.), *aff'd per curiam*, 4 ERC 1815 (D. C. Cir. 1972), *aff'd by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

4. 39 Fed. Reg. 7270 (Feb. 25, 1974).

5. 39 Fed. Reg. 42510 (Dec. 5, 1974).

6. The regulation was subsequently amended in respects not here material and, most recently, suspended indefinitely. 40 Fed. Reg. 28064 (July 3, 1975). In the Administrator's appropriation for fiscal 1975, Congress prohibited the expenditure of any funds to administer it. Section 510, Agriculture-Environmental Consumer Protection Appropriations Act, P. L. 93-563, 88 Stat. 1822 (Dec. 31, 1974). Additionally, Congress is actively considering amending the Clean Air Act to delineate the Administrator's "indirect source" obligations. See, 6 BNA Environment Reporter, *Current Developments*, at 1004 (Oct. 10, 1975).

7. The Administrator's rationale for excluding automobile-related pollutants from the "significant deterioration" regulation is stated in 39 Fed. Reg. at 42511 (Dec. 5, 1974). The "significant deterioration" or "nondegradation" controversy is also now receiving Congressional attention. 6 BNA Environment Reporter, *Current Developments* at 1009 (Oct. 17, 1975). It appears that consideration is being given to a possible amendment to the Act which might clarify the Administrator's "nondegradation" responsibilities with respect to automobile-related pollutants. *Id.*, at 548, 549 (Aug. 1, 1975).

trict Court should have compelled the Administrator to promulgate an "indirect source" regulation retroactively applicable to Developers' project. The Court noted that the Administrator had promulgated an "indirect source" regulation, and that Petitioners sought adjudication of the validity of a provision in that regulation exempting "indirect sources" which, like Developers' center, had commenced construction prior to the regulation's effective date (519 F. 2d at 688; App. 20).[8] The Seventh Circuit held that such a provision defining the scope of a regulation is an integral part of the regulation itself, and that judicial review of the sufficiency of the Administrator's stated reasons for the exemption provision (39 Fed. Reg. at 7272-3) would require examination of the administrative record which was not before it on the appeal from the District Court's judgment (519 F. 2d at 689; App. 22). It therefore held that the exemption provision could not be reviewed in the action Petitioners filed in the District Court, but only by a petition for review of the regulation filed in a Court of Appeals (*Ibid.*). The Court noted that Petitioners had in fact filed such a petition for review of the promulgated "indirect source" regulation, which was pending in the District of Columbia Circuit where their claims would be decided in due course (*Ibid.*).[9] The Petition does not question this part of the Seventh Circuit's disposition of Count I.

Turning to Petitioners' Court I "significant deterioration" claim against the Administrator (519 F. 2d at 689-690; App.

8. The Appendix cited above and elsewhere in this Brief is the Appendix to the Petition.

9. The Seventh Circuit did not reach the Developers' contention, with which the Government agreed, that both the effective date of the regulation and the exemption of shopping centers which, like Developers', commenced construction prior to that effective date, had been ratified by Section 4(b) of the Energy Supply and Environmental Coordination Act of 1974, P. L. 93-319, 88 Stat. 246 (June 22, 1974), which amended Section 110(c) of the Clean Air Act, among other ways, by addition of new sub-sections (2)(C) and (D), 42 U. S. C. §§ 1857c-5(c) (2)(C), (D). See, *Conference Report to Accompany H. R. 14368*, H. Rep. No. 93-1085, at page 40 (93rd Cong., 2d Sess., June 6, 1974).

23), the Seventh Circuit held that Petitioners could not maintain Count I to compel the Administrator to promulgate a "significant deterioration" regulation because Petitioners had failed to comply with the Clean Air Act. Section 304(a)(2) of the Act confers upon the District Courts jurisdiction of actions to compel the Administrator to perform a non-discretionary act or duty, but Section 304(b)(2) specifically prohibits commencement of any such action without first giving 60 days prior notice to the Administrator. 42 U. S. C. §§ 1857h-2(a)(2), (b)(2). Petitioners "made no attempt whatsoever to comply with the notice provision" (519 F. 2d at 691; App. 24-25), as the Petition itself admits at page 6, and the Seventh Circuit held this defect fatal to Petitioners' allegation of right under the special Clean Air Act provision.

The Petition, at page 6, asserts that the notice required by Section 304 was not given because Petitioners sought preliminary injunctive relief. It does not, however, advise this Court of the uncontroverted facts pertinent to Petitioners' implication that, when the Complaint was filed, they faced an unforeseen situation:

1. In January, 1972, the Administrator publicly announced that he would not promulgate regulations to prevent "significant deterioration" of air quality.[10] Petitioners did nothing.

2. Although Paragraph 40 of the Complaint alleges that the Administrator had a duty to promulgate "significant deterioration" regulations no later than July 31, 1972, that date came and went, but still Petitioners did nothing.

3. Developers' plan to construct the shopping center was publicly announced on January 19, 1973,[11] and Petitioners not only knew of it, but admittedly commissioned a traffic study of

10. *Sierra Club* v. *Ruckelshaus, supra,* 344 F. Supp. at 254.

11. Note 11 and accompanying text at page 8 of the Memorandum submitted to the Seventh Circuit by Petitioners in support of their motion (which was denied) for a temporary injunction pending appeal.

the proposed project which was completed on March 13, 1973.[12] Still they did not assert their claim that the Administrator was in default of a duty to promulgate a regulation.

4. Petitioners' inaction continued until the Complaint was filed, on November 30, 1973, by which date Developers had millions invested in the shopping center with millions more committed, and had commenced work on the project.

On these uncontroverted facts, no claim could properly be made that the 60-day notice requirement of Section 304 rendered that remedy for administrative inaction inadequate in the circumstances of this case.

The Seventh Circuit also considered Petitioners' claims that mandamus against the Administrator or its equivalent were available to them under 28 U. S. C. §§ 1331, 1361 or 5 U. S. C. §§ 701 *et seq*. It held that these other remedies were not available to these Petitioners for the specific reason that they are available only when there is no other adequate remedy, while the direct remedy of Section 304 of the Clean Air Act was an adequate remedy in the circumstances of this case for the administrative inaction Petitioners had alleged (519 F. 2d at 691-692; App. 26-28). These holdings made it unnecessary for the Court to consider Petitioners' assertion of need for a second order by a second District Court requiring the Administrator to do what he had already been required to do in the *Sierra Club* case, note 3 *supra*.

Having disposed of Count I as to the Administrator, the Seventh Circuit went on to hold that Count I contained no basis for enjoining Developers (519 F. 2d at 693; App. 30). The Petition does not discuss the lower court's disposition of Count I as to Developers, and advances no reason why it should be reviewed by this Court, even assuming, *arguendo*, that review is undertaken of the dismissal of Count I against the Administrator.

12. *Id.*, notes 14 and 15 at page 9.

While the Respondent Developers were not parties to the petition for review which the Seventh Circuit dismissed, they are aware of the circumstances under which, and the reason why it was consolidated with the appeal from the District Court's dismissal of the Complaint.

The petition for review itself suggested that it be consolidated with the appeal "since both causes involve identical facts and identical issues". Shortly after it was filed, certain third persons moved for transfer to another Circuit where other petitions for review of the same regulation were already pending. Petitioners' response was a memorandum in which they again represented to the Seventh Circuit that "identical issues of fact and law are raised" by their petition for review and by their appeal.

The Seventh Circuit took Petitioners at their word and, on February 7, 1975, two weeks before scheduled oral argument of the appeal, entered an order denying transfer and consolidating the petition for review with the appeal, adhering to the date already set for oral argument, all as Petitioners had requested, and stating that:

> "Petitioners have represented in their Petition for Review and Memorandum in Opposition to Motion to Transfer that the consolidated cases present identical substantive issues on appeal."

Requests for reconsideration of the order of consolidation were filed, by the Respondent Developers among others, pointing out that an appeal from a District Court dismissal of a Complaint and a petition for review of an administrative regulation necessarily have different records and raise different issues, and that the administrative record necessary for review of the regulation for alleged inadequacy was not yet before the Court and could not be brought before it by the date set for oral argument of the appeal with which the petition for review had been consolidated. The Seventh Circuit, on February 11, 1975, not only declined to reconsider its order of consolidation, but

did so in terms which dispelled any conceivable lingering doubt of the terms on which consolidation had been ordered at Petitioners' suggestion and on the basis of their repeated representations that they sought to raise by their petition for review *only* issues "identical" to those already raised in their appeal:

> ". . . This Court based its order [of consolidation] on the fact that Petitioner-appellants intended to raise identical substantive issues in its petition for review as it has in its brief in [the appeal] . . . . This Court's February 7, 1975 order of consolidation was intended to limit the scope of Petitioner's petition for review to the issues raised in [the appeal]."

That order concluded by advising Petitioners and everyone else, in no uncertain terms, that the Seventh Circuit understood that Petitioners did not wish to raise "the issue of adequacy of the EPA regulations", and had limited the scope of their petition for review to the Administrator's failure to act alleged in Count I of the Complaint.[13] Petitioners acquiesced.

The Seventh Circuit dismissed the petition for review on the ground that the Administrator's alleged failure to act, the issue to which the petition for review had been limited, could not be challenged by petition for review but only by action commenced in the District Court, and that such an action must be brought under and in compliance with Section 304 of the Act where, as here, it is an adequate remedy.

13. For the Court's convenience, the full text of the Seventh Circuit's order of February 11, 1975, is set forth in the Appendix which follows this Brief in Opposition.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

A. Even if This Court Reviews the Disposition of Petitioners' Claims Against the Administrator, Review of the Dismissal of the Complaint Against the Developers Is Unwarranted.

It is undisputed that Developers have neither violated nor threatened to violate any regulation issued under the Clean Air Act, and it is more than time for their role in this litigation to come to an end, whether or not the dispute goes on between Petitioners and the Government. There is no reason why this Court should review the dismissal of the Complaint which sought an injunction against the Developers. The courts are in harmony that injunctions do not lie against private citizens in the circumstances of this case.

In a case with remarkable factual similarity, the Ninth Circuit reached the same result as was reached below as to Developers, affirming dismissal of a Complaint for injunction against shopping center construction which allegedly should have been but was not regulated under the Clean Air Act. *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F. 2d 390 (9th Cir.), *cert. denied*, 419 U. S. 1034 (1974). The Court there held that private parties may not be enjoined under the Act except from violating regulations which have been issued and which are in effect.

Even if the Administrator is ultimately held to have committed a wrong, the dismissal of the Complaint against Developers would still be right. Petitioners sought to enjoin Developers' lawful use of their own land as a "remedy" for the alleged wrongs of the Administrator. It has long been settled that no one has a right to a "remedy" against the lawful conduct of another. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 483 (1937).

For these reasons, this Court should not review the decision below affirming dismissal of Count I of the Complaint against the Respondent Developers.

B. The Decision Below as to the Administrator Does Not Warrant Review by This Court.

Contrary to Petitioners' assertions, the decision below does not ignore the saving clause contained in Section 304(e), 42 U. S. C. § 1857h-2(e), and does not hold that the special remedy for administrative inaction provided by Section 304(a) of the Act is exclusive in all cases:

> ". . . the saving provision [Section 304(e) of the Clean Air Act], expressing the general intention of Congress not to disturb existing rights to seek relief, does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights. . . . We are not holding that if the remedy provided by the statute were inadequate in the circumstances of a particular case, other remedies would be unavailable." 519 F. 2d at 693; App. 29.

The Seventh Circuit gave effect to the Section 304(e) saving clause by carefully considering each and every basis on which Petitioners attempted to maintain their District Court action against the Administrator without giving the notice which would have entitled them to proceed under Section 304(a)(2). Wherever it turned, it found a right to proceed conditioned upon the inadequacy of the special statutory procedure, which was adequate in this case but not followed by Petitioners, and its decision so holding does not conflict with the decisions cited in the Petition.[14]

Rusk v. *Cort*, 369 U. S. 367 (1962), decided that the special provision of the Immigration and Nationality Act for review by habeas corpus of an administrative decision of forfeiture of citizenship, under the circumstances of that case, did not preclude forms of review otherwise available. It did not decide that other forms of review were available in all circumstances. While that

14. "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action. . . ." 5 U. S. C. § 703.

Act's special habeas corpus remedy was not held inadequate in so many words, its inadequacy in the circumstances of the case is explicit in this Court's statement that resort in that case to habeas corpus would have required:

> ". . . that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States." 369 U. S. 375.

Abbott Laboratories v. *Gardner*, 387 U. S. 136 (1967), decided that the special provision of the Federal Food, Drug and Cosmetic Act, as amended, for review of certain regulations promulgated under the Act had not by silence precluded forms of review otherwise available. It did not decide that forms of review other than provided specifically by the Drug Act were available in all circumstances. While the Drug Act's special review procedure was not specifically held inadequate by *Abbott*, its inadequacy in the circumstances presented is implicit in this Court's opinion, 387 U. S. 152-154.

Natural Resources Defense Council, Inc. v. *Train*, 510 F. 2d 692 (D. C. Cir. 1975), held that Section 505(a) of the Water Pollution Control Act, as amended, which parallels Section 304(a) of the Clean Air Act, does not oust the District Courts of subject matter jurisdiction to award other available remedies to compel the Administrator to perform a duty. The decision considered only the trial court's subject matter jurisdiction to award such other remedies as might be available, 510 F. 2d at 698-699, and neither holds that other remedies are available in all cases nor delineates the circumstances in which they are available.

The lack of conflict between the decision below and the views of the District of Columbia Circuit is demonstrated by a more recent decision by that Court which Petitioners chose to relegate to a footnote. *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F. 2d 654 (D. C. Cir. 1975), decided that the particular relief there sought could be obtained by filing a Section 307

petition for review in the Court of Appeals, and not by filing an action in a District Court. In the course of so deciding, the Court declined to consider the possibility of District Court jurisdiction under 28 U. S. C. § 1331, "[b]ecause we find that petitioners do not lack a forum in which to bring their action. . . ." 515 F. 2d at 658 n. 5. The Court went on to state its view that the Administrative Procedure Act is an independent source of jurisdiction "of the 'gap-filling' variety", 515 F. 2d at 663, and then emphasized and re-emphasized its view that independent "gap-filling" jurisdiction is conferred by the A. P. A. *only* when there is no other adequate judicial remedy. 515 F. 2d at 664. These views are consistent with those expressed in *Anaconda Company* v. *Ruckelshaus,* 482 F. 2d 1301, 1304 (10th Cir. 1973), and are precisely the basis on which the Seventh Circuit rejected Petitioners' effort to proceed under 28 U. S. C. § 1331 and the Administrative Procedure Act. There is no conflict.

In affirming the dismissal of Count I of the Complaint, the Seventh Circuit had no occasion to consider and did not consider the scope of review available in the District Court in a Section 304 action. While Petitioners assert that such actions may not encompass alleged abuse of discretion, the District of Columbia Circuit has indicated that they do encompass alleged abuse of discretion. *Oljato Chapter, supra,* 515 F. 2d at 663 n. 14. In any event, it is unnecessary and inappropriate to engage in idle speculation as to the Seventh Circuit's possible decision on this question in the future. If and when it decides this question contrary to the view of the District of Columbia Circuit, there will be time enough for this Court to consider whether the conflict is of such moment as to merit this Court's attention.

Natural Resources Defense Council, Inc. v. *Environmental Protection Agency,* 512 F. 2d 1351 (D. C. Cir. 1975), decided that the authority to award attorney's fees conferred by Section 304 of the Clean Air Act is limited to District Court actions brought pursuant to that section, and does not include actions initiated under Section 307 by filing a petition for review with a

Court of Appeals. The decision below does not remotely touch upon this question.

Just as there is no conflict among the federal courts concerning the circumstances in which the notice required by Section 304 must be given, so, contrary to Petitioners' contention, there is no conflict between or confusion among the courts concerning the respective jurisdiction of the District Courts and the Courts of Appeals. The District Courts may, in appropriate cases, order the Administrator to act; once he has acted, review of the "adequacy of his regulations" must be sought by petition for review to the Court of Appeals.[15]

When the Complaint was filed, no regulations had been promulgated. During the pendency of the case, they were promulgated but not to Petitioners' satisfaction. Petitioners' challenge to the "indirect source" regulation has been raised by a petition for review now pending before the District of Columbia Circuit. Their petition for review of the "significant deterioration" regulation filed before the Seventh Circuit was at their request limited to an issue not cognizable by a petition for review and submitted for decision without the administrative record. Hence it had to be dismissed. No real jurisdictional dilemma under the Clean Air Act exists and review of the dismissal of Count I is not warranted.

15. *Plan For Arcadia, supra; Anaconda Company* v. *Ruckelshaus,* 482 F. 2d 1301, 1304 (10th Cir. 1973); Compare *Sierra Club* v. *Ruckelshaus, supra* note 3, with the subsequent order in the same case cited and discussed in note 1 at page 4 of the Petition.

CONCLUSION.

Respondents Sears, Roebuck and Co. and Homart Development Co. respectfully pray that the Petition be denied as to the Seventh Circuit's decision affirming dismissal of Count I of the Complaint.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

February 11, 1975.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

THE CITY OF HIGHLAND PARK, ET AL.,
Plaintiffs-appellants,

No. 74-1271 *vs.*

RUSSELL E. TRAIN, ET AL.,
Defendants-appellees,

THE CITY OF HIGHLAND PARK, ETC., ET AL.,
Petitioners,

No. 75-1006 *vs.*

RUSSELL E. TRAIN, Administrator and U. S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

SIERRA CLUB, ET AL.,
Intervenors.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73 C 3027

Petition for Review of an Order of the United States Environmental Protection Agency.

This matter comes before the Court on Intervenor's "Motion For Reconsideration Of The Order Granting Consolidation of

Case Nos. 1271 and 75-1006", and the "Motion of Defendants-appellees Northbrook Court Associates and Sears, Roebuck and Co. For Reconsideration Of Order Of Consolidation".

On February 7, 1975 this Court ordered the consolidation of the above appeals. This Court based its order on the fact that Petitioner-appellants intended to raise identical substantive issues in its petition for review as it has in its brief in 74-1271, filed herein on September 14, 1975. In light of the pending Motion to Dismiss Appeal 74-1271, which is to be taken with the case, it appears that Petitioners have attempted to safeguard their jurisdictional ground by filing the petition for review in 75-1006. Without making any comment on the propriety of the action employed by Petitioners in the instant appeals, consolidation of the two cases is in the interest of judicial economy. This Court's February 7, 1975 order of consolidation was intended to limit the scope of Petitioner's petition for review to the issues raised in 74-1271.

Intervenors have indicated their intent to raise the issue of adequacy of the EPA regulations promulgated December 5, 1974, 39 Fed. Reg. 42509. Because this issue is not within the scope of the present consolidated appeals and because Intervenors have been granted leave to intervene in *Indiana-Kentucky Electric Corp., et. al.* v. *U. S. Environmental Protection Agency*, 74-2055, in which case intervenors will have the opportunity to challenge the adequacy of the regulations in question. IT IS HEREBY ORDERED, sua sponte, that the Order of this Court granting intervention be, and the same is hereby, VACATED.